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RM Bakery, LLC d/b/a Leaven & Co., a wholly-owned subsidiary of BKD Group, LLC and Make the Road New York. Case 02–CA–235116

October 8, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN
AND EMANUEL

The General Counsel seeks a default judgment in this case on the ground that the Respondent, RM Bakery, LLC d/b/a Leaven & Co., a wholly-owned subsidiary of BKD Group, LLC, has failed to file an answer to the complaint. Upon a charge and amended charge filed by Make the Road New York on January 30 and April 1, 2019,¹ respectively, the General Counsel issued a complaint on June 10 against the Respondent, alleging that it has violated Section 8(a)(1) of the National Labor Relations Act. The Respondent failed to file an answer.

On July 8, the General Counsel filed with the National Labor Relations Board a Motion for Default Judgment. On July 10, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.²

The Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively stated that, unless an answer was received by June 24, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter and electronic mail dated June 24, notified the Respondent that unless an answer was filed by July 1, a motion for default judgment would be filed. Nevertheless, the Respondent

¹ All dates are in 2019 unless otherwise indicated.

² On August 5, the General Counsel filed a Motion to Expedite Default Judgment and Board Order asserting the urgency of a final Board Order to remedy the Respondent's unlawful conduct and to mitigate the resulting chilling effect on the remaining employees' exercise of their Sec. 7 rights. The Respondent also filed no response to this motion. We deny this motion as moot in light of our disposition of the case.

failed to file an answer or request an extension of time to file an answer.

In the absence of good cause being shown for the failure to file an answer, we deem the allegations in the complaint to be admitted as true, and we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a limited liability corporation of Delaware with an office and place of business located at 220 Coster Street, Bronx, New York 10474 (the facility), and has been engaged in the production and the non-retail sale of baked goods.

During the 12-month period ending April 25, the Respondent sold and shipped, from the facility, goods valued in excess of \$50,000 directly to points outside the State of New York.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

1. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and/or agents of the Respondent within the meaning of Section 2(13) of the Act:

Dan Wilczynski	-	Executive Vice President
Norman Rich	-	Chief Financial Officer
Daniel Kain	-	Route Manager
Victor Colado	-	Route Manager

2. On or about September 28, 2018, the Respondent failed to pay its employees Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown for hours worked.

3. On or about October 5, 2018, the Respondent failed to pay its employees Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown for hours worked.

4. On or about October 9, 2018, the Respondent employees Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown ceased work concertedly and engaged in a one-day strike in protest of the Respondent's failure to pay employees.

5. On or about October 10, 2018, the Respondent terminated employees Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown.

6. The Respondent engaged in the conduct described above in paragraph 5 because Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown engaged in the conduct described above in paragraph 4 and to discourage employees from engaging in these or other concerted activities.

CONCLUSION OF LAW

By the conduct described above, the Respondent has been interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act. The unfair labor practices of the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(1) by terminating employees Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown for engaging in protected concerted activity, we shall order the Respondent to offer these employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with our decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate the employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

In addition, we shall order the Respondent to compensate the named employees for any adverse tax consequences of receiving a lump-sum backpay award and to file a report with the Regional Director for Region 2 allocating the backpay award to the appropriate calendar

year for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

The Respondent shall also be required to remove from its files any reference to the unlawful terminations of Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown and to notify them in writing that this has been done and that the unlawful terminations will not be used against them in any way.³

ORDER

The National Labor Relations Board orders that the Respondent, RM Bakery, LLC d/b/a Leaven & Co., a wholly-owned subsidiary of BKD Group, LLC, Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating or otherwise discriminating against its employees because they engaged in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown whole for any loss of earnings and other benefits they may have suffered as a result of their unlawful terminations, in the manner set forth in the remedy section of this decision.

(c) Compensate Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful terminations of Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown, and within 3 days thereafter, notify the employees in writing that

³ In the complaint, the General Counsel requests that the notice be posted in English and Spanish. We grant this request.

this has been done and that the unlawful terminations will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days of service by the Region, post at its Bronx, New York facility copies of the attached notice marked "Appendix" in both English and Spanish.⁴ Copies of the notice, in English and Spanish, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 10, 2018.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 8, 2019

John F. Ring, Chairman

Lauren McFerran, Member

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT terminate you because you engaged in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown whole for any loss of earnings and other benefits they may have suffered as a result of their unlawful terminations, less any net interim earnings, plus interest, and WE WILL also make those employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by

agreement or Board order, a report allocating the back-pay awards to the appropriate calendar year for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful terminations of Juan Carlos Abarca, Nestor Marquez, Rene Moran, Gilberto Paniura, and Clayton Brown, and WE WILL within 3 days thereafter, notify them in writing that this has been done and that the unlawful terminations will not be used against them in any way.

RM BAKERY, LLC D/B/A LEAVEN & CO., A
WHOLLY-OWNED SUBSIDIARY OF BKD GROUP,
LLC

The Board's decision can be found at <http://www.nlr.gov/case/02-CA-235116> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

